

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Cram Communications, LLC)	File No. BNP-20001023AGI, as modified by
)	File No. BMP-20030804AAE
Request to Toll the Period to)	
Construct Unbuilt Station WVOA(AM),)	Facility ID No. 135358
DeWitt, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 2008

Released: January 18, 2008

By the Commission:

I. BACKGROUND

1. The Commission has before it an Application for Review filed by Cram Communications, LLC (“Cram”), permittee of unbuilt broadcast station WVOA(AM), DeWitt, New York.¹ Cram seeks review of a September 24, 2004, staff decision (“Staff Decision”) which denied, in part, its request to “toll” the station’s construction period pursuant to Section 73.3598(b) of the Commission’s Rules (the “Rules”).² For the reasons set forth below, we deny the Application for Review.

2. On January 16, 2002, the staff granted a permit authorizing Cram to construct a new AM station, WVOA(AM). The permit specified a construction deadline of January 16, 2005. The permit also specified two transmitter sites, one for daytime operations (the “Wolf Site”) and the other for nighttime operations. At the time of the grant of the WVOA(AM) construction permit the Wolf Site was industrially zoned and the site of another AM radio tower. Cram was required to obtain a building permit from the City of Syracuse (“City”) to build at the Wolf Site. The Wolf Site also is located near the Syracuse Harbor, which the City had been planning to revitalize since 1999.³ On July 16, 2002, the City imposed a six-month moratorium (the “Moratorium”) that “would prohibit the issuance of building permits” in a newly-defined “Lakefront Development Area” which included the Wolf Site.⁴ Thereafter, the City extended the Moratorium several times. On August 4, 2003, Cram filed an application to specify a new site for WVOA(AM) nighttime facilities (the “LaFayette Site”).⁵ On November 17, 2003, the

¹ Cram supplemented its Application for Review by providing additional local zoning documents with consent from the staff on April 14 and 15, 2005.

² See *Letter to James L. Oyster, Esq.*, Ref. 1800B3-IB/GDG (Sept. 24, 2004).

³ See Tolling Request, Exhibit 1 at 1 and Exhibit 2A at 1.

⁴ See Syracuse, NY, Ordinance Authorizing Six Month Moratorium to the Issuance of Building Permits in the Lakefront Development Area (July 16, 2002) (“Moratorium”) (Tolling Request, Exhibit 2). The purpose of the Moratorium was to “allow time for completion of the planning and rezoning efforts and . . . [to protect] the area from development inconsistent with these efforts.” See Moratorium, Exhibit A. The Moratorium is not worded to prohibit the *filing* of a building permit application, but Cram alleges that the City would not have accepted an application during the Moratorium. See note 9, *infra*.

⁵ File No. BMP-20030804AAE.

Commission issued a construction permit for the LaFayette nighttime facilities. Shortly thereafter, Cram filed an application also seeking Commission authority to move its daytime facilities to the LaFayette Site.⁶

3. On January 26, 2004, with the Moratorium still in effect, the City's Common Council adopted a new zoning ordinance (the "Ordinance"), which the City's Mayor signed into law on January 28, 2004.⁷ Cram states that it contacted the City on June 8, 2004, to inquire about applying for a permit to build a new radio tower at the Wolf Site. Cram has supplied a copy of the City's June 10, 2004, response, which identifies the Ordinance as prohibiting new "freestanding towers for wireless communications" in the Lakefront area.⁸ It now appears that Cram never applied for a City building permit at the Wolf Site.⁹

4. On September 7, 2004, Cram brought a lawsuit against the City challenging the Ordinance's constitutionality. On September 15, 2004, Cram filed a tolling request, citing Section 73.3598(b)(ii) of the Rules. That rule provides, in relevant part, for tolling of the construction period when construction is delayed by "any cause of action pending before any court of competent jurisdiction relating to any necessary local, state, or federal requirement for the construction or operation of the station, including any zoning or environmental requirement."¹⁰ Cram argued that, pursuant to the rule, the construction period for WVOA(AM) began to toll on July 16, 2002, the effective date of the Moratorium, and should continue to toll until resolution of the lawsuit.

5. In its September 24, 2004, decision, the staff ruled that the WVOA(AM) construction period began to toll on September 7, 2004, the date Cram filed its lawsuit. The staff dismissed as untimely Cram's claim for an additional 26-month tolling period based on the Moratorium and Ordinance. The staff nevertheless briefly addressed the merits of Cram's untimely arguments. In particular, the staff found that the Moratorium and Ordinance did not qualify as tolling events under Section 73.3598(b)(ii) because those matters were not causes of action pending before a court. The staff treated the Moratorium

⁶ File No. BMP-20031124ALF. Cram's application to modify the daytime site required Canadian coordination. The staff denied Cram's April 27, 2004, request for tolling based on matters related to the Canadian coordination. Cram did not seek reconsideration or review of that decision.

⁷ See Syracuse, NY, Zoning Rules and Regulations, part B, § IX, art. 5 (2004).

⁸ See Letter from Heather Lamendola, Office of Zoning Administration, to Cram Communications, LLC (June 10, 2004). See also WVOA Timeline (Application for Review, Exhibit 1).

⁹ An exhibit to Cram's initial tolling request alleged that on unspecified dates in 2004, "Cram submitted a request for the issuance of a building permit . . . [which] has been denied by the Office of Zoning Administration, City of Syracuse." Verified Complaint, *Cram Communications v. Mayor of Syracuse* at 2 ("Complaint") (Tolling Request, Exhibit 1). The Staff Decision thus states that Cram had filed and the City had denied an application for a building permit at the Wolf Site. However, a detailed, 14-page "WVOA Timeline" submitted with the Application for Review (as Exhibit 1) did not identify the filing of any such building permit application. In April 2005, the staff asked Cram's counsel to supply dates on which Cram applied for a building permit and on which the City denied the application. Cram's counsel responded by e-mail: "From the date the moratorium went into effect, the City of Syracuse would not accept an application for a building permit. The applicant did submit a [June 8, 2004] letter requesting an explanation as to why it could not file an application for a permit. The City responded by letter on June 10[, 2004,] indicating that towers in the Lakefront Zoning District are expressly prohibited and not eligible for consideration with a Special Use Permit." E-mail from James Oyster, Counsel, Cram, to Audio Division, FCC (Apr. 14, 2005, 18:44 EST). Thus, it appears that Cram's "request" and the City's "denial" referenced in the tolling request pertained to Cram's June 2004 correspondence with the City.

¹⁰ 47 C.F.R. § 73.3598(b)(ii).

and Ordinance as “initial zoning matters” and stated that the Commission had categorically excluded such matters as grounds for tolling.¹¹ Cram timely filed its Application for Review on October 25, 2004.¹²

6. On May 18, 2005, while the Application for Review was pending, the staff granted Cram’s application to move its daytime operations to the LaFayette Site.¹³ A condition on the modified permit explained that, as of the date of its issuance, tolling ceased because it had been based on litigation concerning construction of the daytime facilities at the Wolf Site. The staff revised the permit’s expiration date to September 26, 2005, reflecting the 131-day period that remained in the WVOA(AM) construction period when the tolling event – *i.e.*, commencement of the Wolf Site litigation – occurred. The modified permit further explained that the September 26, 2005, expiration date is without prejudice to any adjustment the Commission might find appropriate in connection with the instant Application for Review. On June 9, 2005, Cram submitted a Petition for Reconsideration, rejecting the permit as so conditioned. Cram requested that the daytime permit for the LaFayette Site be re-issued without the condition. Alternatively, Cram requested that the staff rescind the grant of its LaFayette daytime application.¹⁴ On June 28, 2005, the Onondaga Nation (the “Nation”) also filed a Petition for Reconsideration of our grant of the permit for the daytime operations at the LaFayette Site. The Nation stated that the LaFayette Site borders the Nation’s land, was once used as a hunting ground, and may contain cultural artifacts. The Nation alleged that grant of the LaFayette permit prior to any communications between Cram and the Nation about any potential cultural impact of construction conflicted with the National Historic Preservation Act.¹⁵

7. On November 3 2005, the staff vacated the grant of the LaFayette permit on its own motion based on actions that the New York State Historic Preservation Office (“SHPO”) had taken in response to concerns raised by the Nation.¹⁶ The SHPO withdrew its determination that construction at the LaFayette Site would have “no effect,” and indicated that its ability to reissue such a determination would depend on the outcome of discussions between Cram and the Nation. The staff directed Cram to initiate communication with the Nation. Pending completion of communications and issuance of a modified permit, Cram continues to hold a permit authorizing daytime facilities at the Wolf Site, with 131-days remaining in the construction period, and tolling based on litigation which, as of Cram’s last status report of November 8, 2007, remains pending.

¹¹ See Staff Decision at 2 (citing *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17539 (1999) (“*Streamlining Recon.*”). See also *1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056 (1998) (“*Streamlining Order*”).

¹² On review, Cram raises new matters regarding construction difficulties at each of its authorized nighttime facilities. Those matters were not presented for staff consideration and, accordingly, will not be considered in this order. See 47 C.F.R. § 1.115(c). On June 2, 2005, Cram’s counsel attempted to provide a revised timeline by e-mail, reflecting additional information about zoning progress at the LaFayette Site. The Staff advised Cram that it would not accept that information by e-mail. On June 9, 2005, Cram filed the timeline as part of a reconsideration pleading concerning its application for daytime authority at the LaFayette Site. See *infra* para. 6. Matters concerning the LaFayette Site cannot affect the outcome of this case. The decision under review is limited to whether Cram is entitled to tolling based on the difficulties it has experienced in attempting to construct facilities at the Wolf Site.

¹³ See note 6, *supra*.

¹⁴ See 47 C.F.R. § 1.110.

¹⁵ See 16 U.S.C. § 470f.

¹⁶ See *Cram Communications, LLC*, Letter, 20 FCC Rcd 17153 (2005).

II. DISCUSSION

8. On review, Cram argues that it should have more than 131 days to construct after the litigation is resolved. It challenges the staff's treatment of the Moratorium and Ordinance as initial zoning matters that do not qualify for additional construction time. Cram concedes that the Commission has excluded initial zoning problems as grounds for tolling. Nevertheless, Cram contends that the Commission intended only to exclude those zoning matters that applicants could know about in advance, such as issues pertaining to land not yet zoned for radio towers. Cram argues that it could not have anticipated any zoning difficulties at the Wolf Site because the site was already industrially zoned and was the location of another radio tower when Cram received its construction permit from the Commission. Cram stresses that the City changed the zoning laws after the Commission granted the permit.

9. A permit's three-year construction period tolls if construction is encumbered by a natural disaster, certain administrative and judicial reviews, or failure of a condition precedent on the permit, provided that the permittee notifies the Commission within 30 days of the tolling event.¹⁷ The Commission adopted these tolling provisions in its 1998 Streamlining proceeding concurrently with the doubling of the standard radio construction period from 18 months to three years. The Commission stated that zoning matters such as "the pendency of a zoning application before a local zoning board" would not qualify for tolling. The Commission reasoned that a three-year construction period provides ample time either to complete the zoning process and construct the station or to choose a new site free from zoning difficulties.¹⁸ However, the Commission stated that in keeping with its decision to toll the construction period for judicial review, the pendency of a court appeal of a final zoning board decision would qualify for tolling.¹⁹

10. On reconsideration of the *Streamlining Order*, the Commission rejected suggestions to add site-related difficulties to the tolling criteria.²⁰ The Commission acknowledged that factors other than those delineated as tolling circumstances can cause delay, but emphasized that such delays would not generally be so insurmountable as to excuse failure to construct within three years.²¹ Accordingly, the Commission stated that it would waive the three-year construction rule only for "rare and exceptional circumstances" beyond the permittee's control.²² The Commission stated that by doubling the radio construction period, it had provided a built-in safety valve for diligent permittees to complete construction within the permit's term. The Commission concluded that in the vast majority of cases, diligent permittees can resolve zoning issues either by securing an alternative site or by obtaining the necessary approvals.²³

11. Applying these principals to the instant case, we first address whether the staff correctly found that Cram's tolling arguments were untimely with respect to the Moratorium and Ordinance. As discussed above, permittees must notify the Commission within 30 days of a tolling event.²⁴ Even if we

¹⁷ See 47 C.F.R. § 73.3598(b) and (c). See also *Streamlining Recon.*, 14 FCC Rcd at 17540.

¹⁸ See *Streamlining Order*, 13 FCC Rcd at 23091.

¹⁹ *Id.*

²⁰ *Streamlining Recon.*, 14 FCC Rcd at 17538-41.

²¹ *Id.* at 17539.

²² *Id.* at 17541.

²³ *Id.* at 17539.

²⁴ 47 C.F.R. § 73.3598(c). The same period generally applies to requests for waiver of the three year construction period. See *Birach Broadcasting*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1416 (2003), *recon. denied on other grounds*, Order on Reconsideration, 20 FCC Rcd 5764 (2005). Staff practice has been to look back no more than 30 days from an untimely request. See e.g., *Lauren Colby Esq.*, Letter, 21 FCC Rcd 1260 (MB 2006).

accept *arguendo* that the Moratorium and Ordinance could be deemed tolling events, Cram waited two years to disclose to the Commission the adoption of the Moratorium, and its notification concerning the Ordinance was approximately eight months late. On review, Cram does not dispute the staff's determination concerning its failure to bring its Moratorium/Ordinance-related arguments to the Commission's attention in a timely manner. The Cram permit was granted after the tolling rules became effective. Thus, it is appropriate to apply strictly in this case the requirement to promptly advise the Commission of potential tolling events. We affirm the staff's action on that procedural ground.

12. In the interest of a complete record, we briefly consider Cram's arguments. As discussed above, tolling is triggered by limited circumstances, including judicial review of construction permit grants and litigation appealing adverse zoning determinations. We find that the staff correctly rejected Cram's argument that events beginning two years prior to its lawsuit should be considered a judicial review or appeal for purposes of Section 73.3598(b)(ii). As the staff properly observed, tolling begins upon the filing of a cause of action in court. The Moratorium and Ordinance do not qualify as judicial review or as any other encumbrance cognizable under the tolling rule. As a result, such matters could be considered only on a waiver basis. Cram has never requested a waiver.²⁵ Moreover, the record before us does not demonstrate grounds for a waiver.²⁶ Certain Cram actions reflect a lack of diligence in obtaining zoning approvals. It failed to apply for a local building permit during the six-month period between grant of the construction permit and the adoption of the Moratorium. Moreover, Cram did not seek a waiver of the Moratorium once it was enacted.²⁷ The City Planning Commission resolution on which the Moratorium was based explicitly provided for the grant of waivers by the Common Council and City Planning Commission, with consideration given to such factors as economic hardship, commitments entered into prior to the Moratorium, and compatibility with existing and proposed development.²⁸

13. In arguing that its pre-litigation difficulties at the Wolf Site can qualify for tolling Cram mischaracterizes the intent of our tolling rules. Specifically, we reject Cram's claim that the Commission's intention to exclude local zoning and planning problems as grounds for tolling pertains only to land that is not properly zoned at the time of issuance of the Commission's construction permit. As the Commission has stated, the purpose of a three-year construction period with limited tolling is to ensure prompt station construction and the initiation of new radio service.²⁹ To achieve that goal, the Commission "established an incentive for all potential applicants to plan construction carefully even prior

²⁵ See *Streamlining Recon.*, 14 FCC Rcd at 17541; See also 47 C.F.R. § 1.115(c).

²⁶ See generally *KSBN Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 20162 (2004) (denying waiver where applicant did not contemporaneously notify the Commission that a zoning ordinance adopted after grant of FCC construction permit would preclude construction, and chose to build unauthorized facilities rather than immediately to seek a zoning variance, to challenge the ordinance in court, and/or to seek authority to move sites). Waiver requests must demonstrate "rare and exceptional" circumstances beyond the applicant's control.

²⁷ Cram also failed to inquire about applying to the City for a building permit until four months after the Moratorium ended. Cram attributes that delay to the City's failure to provide a promised notification. Nevertheless, a diligent permittee could have checked on the status of the Moratorium immediately following each scheduled expiration date. Further, Cram waited eight months following adoption of the Ordinance to challenge it in court. Cram attributes its eight-month inaction, in part, on local counsel's misunderstanding of the urgency of bringing suit in relation to tolling, and counsel's desire to maintain good relations with the City. It is well established, however, that applicants are responsible for the actions of employees, contractors and agents, including counsel. See, e.g., *KM Radio of St. Johns*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC Rcd 5847 (2004) (actions of engineering contractor); *Belo Broadcasting Corp.*, Decision, 68 FCC2d 1479 (1978) *aff'd sub nom.*, *Wadeco, Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980) (actions of counsel).

²⁸ See Moratorium, Exhibit A at 2. See generally *Wendell & Associates*, Memorandum Opinion and Order, 17 FCC Rcd at 18580 (2002) (denying waiver based on delays following applicant's poor planning).

²⁹ See *Streamlining Order*, 14 FCC Rcd at 17539.

to applying for the [Commission] permit and, once the permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors.”³⁰ A permittee’s selection of land with an appropriate zoning classification is a good start, but falls far short of the complete process needed to obtain local building approvals. Additional requirements will vary from locality to locality, but may include such steps as completing environmental studies, obtaining building permits and/or special use permits, and satisfying other necessary local prerequisites to construction. A permittee should immediately initiate all processes to obtain *all* necessary local approvals – not only obtaining an appropriate zoning classification. As discussed above, Cram did not bring that sense of urgency to obtaining a building permit for the Wolf Site. Cram’s inability to build at that site thus cannot be considered entirely beyond its control. As our rules make clear, delay or denial of necessary local approvals does not trigger tolling; tolling begins only when such matters reach the courts.³¹

14. Similarly, Cram’s argument that it cannot be expected to build an AM station in 131 days is misplaced. The Commission’s tolling process is not based on the amount of time any applicant may claim to need. All broadcast permittees receive an ample three-year construction period. It is the permittee’s responsibility to use its time wisely.³²

III. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, that the Application for Review filed by Cram Communications, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ *Id.*

³¹ See 47 C.F.R. § 73.3598(b)(ii).

³² As explained above, the 131-day period in which Cram will be required to build reflects the time that remained in WVOA(AM)’s three-year construction period when its construction period “clock” stopped once the litigation was initiated. Cram acknowledges that, had it sued the City immediately upon enactment of the new zoning Ordinance, the clock could have stopped with approximately 12 months, rather than 131 days, remaining in the WVOA(AM) construction period. See also note 27 *supra*.